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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 355

VINCENT J. TODARO,

Appellant,

vs.

STATE OF NEW JERSEY,

Appellee.

STATEMENT AS TO JURISDICTION.

Comes now Vincent J. Todaro, appellant herein, and concurrently with the presentation of his petition for the allowance of an appeal from the New Jersey Court of Errors and Appeals to the Supreme Court of the United States, herewith and hereby presents this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such an appeal to review the judgment from which appeal is taken.

The above named appellant in support of the jurisdiction of the Supreme Court of the United States to review on appeal in the above entitled the judgment of the New Jersey Court of Errors and Appeals declaring the statute under attack constitutional, in violative of, and repugnant to the provisions of V and XIV Amendments to the United

States constitution and in conflict with the decisions of the United States.

I.

Statute Sustaining Jurisdiction.

Act of February 13th, 1925, Chapter 229, 43 Stat. 936 (Amendments to May 22, 1939 included) and more particularly designated as appendix to Rules of the Revised Rules of the Supreme Court of the United States, said act is referred to as:

> "An act to amend the Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes."

Sec. 237 (a) of said act and also embodied as a rule of the Supreme Court of the United States provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

II.

The Pertinent Portions of the Statute under Attack Are New Jersey Statutes Annotated.

(N. J. S. A. 2; 164-1) provide:

Buying or Receiving Stolen Property; Possession as Sufficient Evidence to Convict, *Except in Certain Cases.*

> "Any person who shall receive or buy any goods or chattels * * * that shall have been stolen from any other person * * * shall be guilty of a high misdemeanor.
>
> "If the person accused is shown to have or have had possession of such goods, chattels * * * within one year from the date of such stealing such possession shall be deemed sufficient evidence to authorize conviction, unless such person show to the satisfaction of the jury * * *."

1. That the property was a gift; or

2. That reasonable value was paid; or

3. Knowledge that the seller was a regular dealer; or

4. That contemporaneous notice was given to the police; or

5. That prior notice was given to the police when dealing with a minor under 16.

III.

Date of Decree and Application for Appeal.

The final judgment of the New Jersey Court of Errors and Appeals is dated June 19th, 1944, and the application for appeal herein was presented June 23rd, 1944, and denied by said Court June 26th, 1944.

IV.

The nature of the case herein involved is the determination of the validity of the statute heretofore set forth concerning possession of stolen goods.

This is an appeal from the highest Court of the State of New Jersey, and the grounds upon which it is contended the questions are involved are substantial.

It is contended by the appellant that the statute under attack is unconstitutional as being repugnant to V and XIV Amendments, and, the ruling and Judgments of the trial Court and the Court of Errors and Appeals sustaining the constitutionality of said statute are in conflict with the applicable decisions of the Supreme Court of the United States for the following reasons:

1. The statute is arbitrary and unreasonable and denies due process guaranteed under the Article V and XIV Amendments of the United States Constitution and transgresses the limitations placed upon a State Legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact upon which guilt is predicated.

2. Considering the statute as a rule of evidence indicating in what manner the presumption of guilt from proof of possession of stolen property within one year from the date of the theft may be rebutted, then as a rule of evidence it deprives the accused of plenary and full opportunity to rebut the presumption, especially in those cases, other than the excusable subdivisions of the statute, equally consistent with innocence.

3. The statutory presumption created in the statute under attack cannot be sustained because there is no rational connection between the facts of possession proved under the circumstances of the statute, with the ultimate fact presumed, to wit, (guilty knowledge that the goods were stolen).

4. An accused is entitled to any and all defenses to meet an issue and not those selected for him by a State Legislature.

5. The statute in question shifts the burden and obligation upon a defendant to exculpate himself otherwise the jury is left free to act on the presumption alone once the specified facts are proved.

6. The statute precludes proof of lawful possession by bailment, barter, finding, exchange, replevin and other legal means consistent with innocence, and therefore denies plenary opportunity to repel the harmful presumption of guilt because of mere possession which is arbitrary and unreasonable in violation of due process of law.

7. It destroys the presumption of innocence by compelling the accused to assume the burden of proof to establish his innocence.

8. It usurps the prerogatives of the judiciary which determines the legal effect of possession and the existence of prima facie case.

9. It invades the functions of the jury which alone determines the existence of the fact of possession.

Stages in Proceedings and in What Manner Questions Sought to Be Reviewed, Were Raised.

10. The unconstitutionality of the statute under attack was first raised in the Trial Court on a motion to quash the indictment; on a motion for a directed verdict at the end of the State's case; and, on a motion for a directed verdict at the conclusion of the entire case. Thereafter the aforesaid questions were raised in the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals by an Assignment of Errors which contain specific quotations of that portion of the record asserting proof of the foregoing statement.

FRANK B. BOZZA,
Counsel for Appellant.

APPENDIX.

OPINION OF COURT OF ERRORS AND APPEALS.

COURT OF ERRORS AND APPEALS.

No. 24, FEBRUARY TERM, 1944

THE STATE OF NEW JERSEY, *Defendant-in-Error,*

vs.

VINCENT TODARO, *Plaintiff-in-Error.*

Submitted February 11, 1944. Decided April 20, 1944.

1. The statute of 1928, now R. S. 2:164-1, providing that possession of stolen property within a year from the date of stealing "shall be sufficient evidence to authorize conviction unless certain facts are shown," held not unconstitutional.

2. After a question to a witness has been asked and answered without objection, a motion by opposing counsel to strike out the answer, if responsive, comes too late.

3. Certain requests to charge held properly refused.

4. The conviction being properly affirmed in the Supreme Court, the reasons given for affirmance in that Court, even assuming they were erroneous, will not lead to a reversal in this Court, the fundamental question being whether there was harmful error at the trial.

Error to Supreme Court, whose opinion is reported in 131, N. J. Law, 59.

For the plaintiff-in-error, Frank B. Bozza and Samuel D. Bozza.

For the State, William A. Wachenfeld, Prosecutor of the Pleas; Jerome B. Litvak, Assistant Prosecutor, and C. William Caruso, Special Assistant Prosecutor.

The Opinion of the Court was delivered by

PARKER, *J.*

The case was submitted on briefs to the Supreme Court, and is similarly submitted here. The first point made for reversal is that the statute, R. S. 2: 164-1, providing in substance that possession of stolen property within a year from the date of stealing "shall be sufficient evidence to *authorize* conviction" (italics ours) unless the accused show certain facts "to the satisfaction of the jury" is unconstitutional.

This statute was first enacted as Chapter 187 of the laws of 1928, P. L., page 356. It enlarges the common law rule, which, as stated by Mr. Bishop ("New Criminal Procedure," secs. 741-2) was "that when the corpus delicti has been proved, if the stolen goods are shown to have been in the possession of the defendant after, or recently after, the theft, the burden of proof reverts to the defendant to explain the possession, otherwise he must be convicted." The learned author severely criticises that rule: but what we are now dealing with is a statute, which has stood on the books for sixteen years, in full force; and was further considered and amended by the legislature in 1938 (P. L. page 875) after being ten years in force.

In the following year, our Supreme Court, in the case of *State* vs. *Giordano*, 121 N. J. Law, 469, upheld the constitutionality of the statute in a careful opinion citing numerous decisions, some of which are by the Supreme Court of the United States. The case was not taken to this court. In *State* vs. *Lisena*, 131 N. J. Law, 39 we adopted the opinion of the Supreme Court in 129 Id. 569 in upholding the constitutionality of the statute. It seems needless at this time to add what was said on the point in those two decisions. After all, the statute in this particular feature simply laid down a rule of evidence by specifying a presumption arising from possession of stolen goods within a time limit. It is claimed that it requires a jury to convict unless the presumption is overcome; but this is far from the fact. The language is that possession within a year "shall be deemed sufficient evidence *to authorize* conviction" unless one or more specified defenses be established. It is now argued

that there are many other methods of lawful acquisition of chattels which are not specified in the statute, and a considerable list of them is presented in the brief. But on this feature of the argument we need go no farther at this time than to say that defendant made and makes no claim to have acquired the property, consisting of automobile tires, in any other way than by purchase from a total stranger in the small hours of the morning.

The foregoing discussion directly covers the refusal to quash the indictment, the refusal to direct a verdict for the defendant when the State rested, and the refusal so to direct at the conclusion of the entire case so far as related to the constitutionality of the statute. Other grounds were advanced on the application for a directed verdict, namely, that there was no proof of possession of the stolen goods in the defendant, and that the police officers "admitted using entrapment by deceit and false premise" to obtain alleged admission from the defendant. As to possession, the proven or admitted facts were that the defendant agrees to buy certain tires from a strange man and that the delivery of the tires was actually in progress and partly accomplished then the police officers appeared on the scene. As to the alleged "entrapment" we are not aware of any legal rule requiring an officer of the law, in questioning a suspected criminal, to adhere to the truth in any statement that he may make. As to the alleged aliases claimed to have been used by the defendant, we think it was legitimate cross examination on the score of credibility.

Another point relates to the refusal of the Court to strike out the answer to the question, "It wasn't seventy-two hours later?" This was the last question asked on direct of a witness called by the State in rebuttal. No objection seems to have been made until after the question was answered and the direct examination concluded. This was too late.

Finally, error is claimed in the refusal of four requests to charge.

The first request was: "If you find from the evidence that the defendant fled from the police officer under mental apprehension of being held up, or harmed from some per-

son, then of course, the accused would have a legal right to flee or seek refuge." This request is faulty in failing to include the element of innocence in the charge.

The second request was: "Mere presence of the accused at or near the scene of the offense is not in and of itself an element of guilt." While this was not charged in the language of the request, we think it is implicit in and fairly covered by the general tenor of the charge.

The third request was charged substantially in the language in which it was presented.

The fourth request was: "It is your duty to resolve any element of doubt in the case in favor of the accused and acquit him."

This is entirely too broad as it would require an acquittal in case of doubt on an immaterial point.

The fifth point in the brief for the plaintiff-in-error deals with several features of the Supreme Court opinion which we deem it unnecessary to discuss; for after all, the determinative question is whether there was error at trial.

The judgment under review is affirmed.

Endorsed: "Filed April 20, 1944. J. A. Brophy, clerk."

No. 355. TODARO *v.* NEW JERSEY. Appeal from the Court of Errors and Appeals of New Jersey. October 9, 1944. *Per Curiam:* The appeal is dismissed since the application in this case of New Jersey Rev. Stat., Tit. 2, Ch. 164, § 1, presents no substantial federal question. (1) *Wilson* v. *United States,* 162 U. S. 613, 619; (2) *Tot* v. *United States,* 319 U. S. 463, 470–72, and cases cited. *Mr. Frank B. Bozzo* for appellant. Reported below: 131 N. J. L. 430, 37 A. 2d 73.